IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Civil Suit No. 81 of 1999

Date of Decision: 8.11.2007

H.P.State Forest Corporation Ltd. and another.

....Plaintiffs.

Versus

Shri Sita Ram

... Defendant

Coram:

The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1] Yes.

For the plaintiffs: Mr. Neel Kamal Sood, Advocate.

For the Defendant: Mr. Rajnish Maniktala, Advocate.

Sanjay Karol, J. (Oral)

The present suit filed by the plaintiffs against the defendant is for a recovery of a sum of Rs.33,78,264/- alongwith interest at the rate of 18% per annum till the date of the actual payment.

As per the case of the plaintiffs, tenders for transportation of timber extracted from various lots of its Pangi Forest Working Division, District Chamba, Himachal Pradesh were invited from general public. The timber was to be floated through various launching points in river Chanderbahaga and collected at a destination called Atholi/

Whether reporters of Local Papers may be allowed to see the judgment?

Gulabgarh. The tender submitted by the defendant was accepted. The plaintiffs awarded the work as per agreement dated 5.9.1992 whereby the defendant was to be paid a sum of Rs.26.95 paise per scant as consideration for the carriage of the timber. Volume of 3,012.841 cubic meters of different species of timber, i.e. Deodar, Kail, Fir and Spruce, was to be transported.

As per the case of the plaintiffs 31,063 scants measuring 3012.841 cubic meters of timber was handed over to the defendant for the carriage. But, however, after carriage only 27565 scants (measuring 2346.92 cubic meters) were handed over at Atholi/Gulabgarh. Thus rendering a short fall of 3498 scants measuring 665.916 cubic meters of timber. Under the agreement loss of only 5% of the total volume was permissible. The losses occurred due to the negligence of the defendant as he did not launch the ghalls in time and also did not deploy sufficient labourers for carrying out the operation.

According to the plaintiffs, the total cost of the timber not delivered is:-

i)	Deodar	: 306.822 m^3 Rs.8591/2 per	Rs.26,35,908/-
ii)	Kail	: 56.846 m^3 Rs.4946/-	Rs. 2,81,155/-
ii)	Fir/spruce	: 151.607 m^3 Rs.3160/- per m^3	Rs.4,49,078/-
		Total	Rs.33,96,141/-

The defendant was to receive a consideration of Rs.7,42,877 out of which Rs.7,25,000 stood paid. Therefore, defendant was liable to pay a sum of Rs.33,78,264/- (Rs.33,96141 – Rs.17,877) to the plaintiffs. The cause of action accrued on 4th June, 1997 when after the final preparation of the accounts, notice was sent to the defendant calling upon him to pay the amount.

In the written statement, the defendant has not disputed the Agreement, the terms and the total quantity of scants received and handed over to the plaintiff. On merits, the defendant has resisted the suit. Reason for loss of timber has been explained. According to the defendant for the purpose of collection of timber a boom was to set up at a place fixed by the plaintiffs. The Central Water Commission objected to fixing of the boom at the earmarked place and therefore, under instructions from the plaintiffs the same had to be shifted to another place which, keeping in view the topography, was a safe place. The shifting of the site and the repeated floods in the river lead to the delay in fixing of the boom. Due to heavy floods the Boom was damaged causing the flow of timber downstream past the Indian Border into the territories of Pakistan. The loss also occurred due to the rough terrain of the course of the river as a result of which the sizeable quantity of timber went into the crevices from where the timber could not be extracted. The Border Road

Organisation was constructing a road along side river Chenab and heavy debris including big boulders were thrown into the river as a result of which timber got buried under them. Also river passed through the terrorist affected area of Jammu and Kashmir and lot of timber was burnt by them. The losses were not due to the defendant's negligence but plaintiffs' inaction and also due to an act of God. The plaintiffs not only approved and cleared the bills but also awarded further contracts to him. This only proved that the defendant was not at fault in carrying the timber in terms with the agreement.

In the replication filed by the plaintiffs, there is a simple denial of the averments made in the written statement.

Based on the pleadings of the parties, following issues were framed on 16.4.2001 & 4.6.2002 :-

1. Whether the plaintiff is entitled to recovery of Rs.33,78,264/- with interest 18% per annum? OPP.

2. Whether the suit is not maintainable in the present form? OPD.

3. Whether the suit has not been filed through a competent person? OPD.

4. Whether the suit is barred by limitation? OPP.

5. Whether the plaintiff is estopped from filing the present suit by his act and conduct? OPD.

6. Whether the suit is bad for non joinder and mis joinder of necessary parties? OPD.

7. Whether there is no cause of action enabling the plaintiff to file the present suit? OPD.

8. Relief.

1-A Whether the timber was destroyed by act of God in flash floods and by reason of construction of road by Border Road Organisation. OPD.

In order to prove its case, the plaintiffs examined five witnesses and the defendant examined himself as defendant witness.

The documents exhibited by the parties are as under:-

The plaintiffs have produced, the letter inviting the tender Ext.PW-2/A; the terms and conditions of the tender Ext.PW-2/B; the biding list Ext.PW-2/C; the rate on which the tender was accepted Ext.PW-2/D; the agreement dated 5th September, 1992 entered into between the plaintiffs and the defendant in relation to the tendered work Ext.PW-2/E; Ext.PW5/A letter dated 31.10.1992 fixing the time schedule; Ext.PW5/B and Ext.PW5/C letters dated 26th November, 1992 and 2nd March, 1993 written by the plaintiffs to the defendant asking him to accelerate the operation by deploying more labour; Ext.PW4/A the extract of the total timber alongwith its volume handed over by the plaintiffs to the defendant; Ext.PW5/D the statement of account showing the total loss suffered by the plaintiffs; Ext.PW-5/E the plaintiff's notice dated 4.6.1997 intimating the losses suffered by the defendant and calling upon him to make good the same. Ext.PW-5/F and

Ext.PW-5/G are the legal notices dated 6.9.1997 and dated 9.10.1997.

Ext.D1 is the launching list showing the total scant alongwith volume received by the plaintiffs from the defendant at the destination. Ext.D2 to Ext.D5 are the quotations dated 24.12.1992 invited by the plaintiffs for the carriage of timber from the forest to the launching point; Ext. D-6 is the letter dated 15.11.1995 written by the Assistant Manager, H.P.Forest Corporation, Pangi Ghall, Camp Kishtwar, to Divisional Manager, Himachal Pradesh State Forest Corporation Limited, Forest Working Division, Pangi at Kullu; Ext.DX1 is the telegram dated 2.11.1992 sent by the plaintiffs to Deshraj; Ext.Dx2 is the letter dated 21.4.1993 written by the Divisional Manger, Forest Working Division, Pangi at Killar to the Divisional Forest Officer, Kistwar Forest Division, Kistwar, J & K; Ext.DX-3 is the letter dated 30th November, 2005 written by the plaintiffs to the defendant offering a proposal for settlement and Mark DX-3 is the photocopy of the inter departmental letter dated 9.7.1997 of the plaintiffs .

Issues No.2, 3 and 6 are not pressed by the learned counsel for the defendant at the time of the hearing and as such have not been decided.

Issues No. 4 and 7.

Ext.PW-2/E agreement dated 5th September, 1992 was entered into between the parties and as per the

work schedule notified vide letter dated 31st October, 1992 Ext.PW-5/A the work was to be completed between 25th October, 1992 to 10th February, 1993. The work stood completed in the year 1993 itself which is evident from the list Ext.D-1 jointly prepared by the parties showing the total number and volume of scants handed over by the defendant to the plaintiffs at the destination. For transporting the same to the sale depot permission was sought by the Divisional Manager, Forest, (Pangi) to the Divisional Manager Kistwar, Jammu and Kashmir vide letter dated 21.4.1993 Ext.Dx2. Thus, cause of action for taking steps for recovery of the losses for the short fall in timber arose in April, 1993. The present suit was filed on 17th April, 1999. PW-5 has deposed that the "job had been completed within agreed time frame."

This Court in H.P.State Forest Corporation and others vs. Achhar Singh and others, 2001(1) Shimla Law Cases, 206, H.P.State Forest Corporation Ltd. and another vs. Paras Ram and another 2001(1), SLJ 486 and H.P.State Forest Corporation Ltd. vs. M/s J.J.Ropeways and Company, 2003(2) Shimla law cases 28, has held that keeping in view the provision of Article 55 of the Schedule to Limitation Act, 1963, the period of three years would start to run, for compensation for breach of contract, when the contract is broken or when the breach takes place for which the suit is instituted. In the present case, it has already been noticed that the breach for short fall in

delivery of the timber took place in March/April, 1993 itself. For the purpose of counting the period of limitation, Ext.PW-5/D dated 23.10.1996 which is the plaintiffs internal statement showing the loss suffered cannot be pressed to extend the limitation. Similarly, the issuance of notice dated 4th June, 1997 Ext.PW-5/E and legal notices dated 6th September, 1997 and 9th October, 1997 Ext.PW-5/F and Ext.PW-5/G calling upon the defendant to pay the amount would not extend the period of limitation. It is not the case of the plaintiffs that after March/April, 1993 any payments were made to the defendant or the defendant had admitted its liability. In fact the DW-1 has deposed that even after the completion of the contract in question, he had been awarded fresh work in relation to other contracts by the plaintiffs. The cause of action, therefore, accrued in favour of the plaintiffs in March/April, 1993 itself. In this view of the matter no cause of action accrued, in favour of the plaintiffs to have instituted the present suit within the period of limitation. Thus the suit is barred by time. Issues No. 4 and 7 are decided against the plaintiffs.

Issues No. 1, 1A and 5.

It is an admitted case of the parties that the timber was to be floated by the defendant in accordance with the agreement Ext.PW-2/E which is otherwise proved by Vinod Kumar Tiwari (PW-2).

Rattan Chand (PW-3) has deposed that in relation to the contract, 31063 scants of timber were handed over to the defendant who had employed about 105-107 labourers to carry out the operations. This witness has admitted the receipt of the timber at the destination in terms of list Ext.D-1, which indicates that 29,000 scants of timber were received by him, thus leaving a short fall of 31063-29000=2,063 scants. This witness has admitted that the place, where the timber was to be launched, the water current is heavy and strong, which results into frequent floods. This witness has admitted that at the time of the collection of the timber, the boom (net of iron wire) put up at the collection site in the State of Jammu and Kashmir had given way due to heavy floods resulting into the washing away of the timber downstream. According to him the timber got buried under the glaciers between the launching and collection points. Some of the timber also got buried under the debris thrown by GREF who were constructing the road on war footing.

Madan Singh (PW-4), Assistant Manager Ghal, Division Pangi, main officer supervising the operation has deposed that 30901 scants of timber were handed over to the defendant for being transported through river Chenab upto the destination point. According to him the defendant had engaged about 100 labourers for the purpose of floating the timber. The labour was sufficient for carrying out the job. He supervised the operation alongwith other

members of the staff including the Deputy Ranger. This witness has deposed that the defendant handed over 29000 pieces of timber at the destination. In cross-examination, he has admitted that the entire timber as originally envisaged in the tender was not ready to be launched at the launching point and in December, 1992 the department had invited quotations (Ext.D-2, Ext.D-3, Ext.D-4, Ext.D-5) for the carriage of the remaining timber upto the launching point. Out of various reports, he has proved Ext.D-6 one of the progress reports in relation to the contract. He has admitted that at the relevant time militants in Jammu and Kashmir had not only destroyed several timber depots belonging to the State of Jammu and Kashmir but had also not allowed the plaintiffs to carry the timber by floating through river Chenab. He admitted that in spite of threats by the militants, the defendant had been doing his job for which he had engaged sufficient labour.

R.S.Banyal, PW-5 has proved letters Ext.PW-5/A, Ext.PW-5/B and Ext.PW-5/C to show that the defendant had been asked to increase the strength of labour and accelerate the execution of the work. This witness has deposed that 31063 scants (Volume 3012 m^3) were entrusted to the defendant and only 27565 (volume 2346 m^3) scants were handed over by the defendant to the plaintiffs. In cross examination he has denied the suggestion that only 30901 scants were handed over to

the defendant by the plaintiffs. He could not remember whether letter Ext.D-2 was received by him or not. He has admitted that at the relevant time there was terrorism in the area. He has neither admitted nor denied the suggestion that the terrorist had not permitted the carriage of the timber by road or by river. He has clarified that he was not personally associated with the work of floating of the timber allotted to the defendant.

In my view, there is contradiction in the statements of PW-4 and PW-5 with regard to actual scants of timber handed over by the plaintiffs to the defendant. PW-4 has deposed that 30901 scants were handed over by the plaintiffs to the defendant at the launching place and 29000 scants were received by the plaintiffs at the destination. But as per the version of PW-5, 31063 scants were entrusted and only 27565 scants were received from the defendant. Version of PW-5 stands falsified also, by documentary evidence. Ext.PW-4/A shows that statement of PW-4 is correct as 30901 scants were handed over by the plaintiffs. Ext.D-1. prepared by PW-3 and countersigned by PW-4, jointly executed between the parties also shows that 29000 number of scants were handed over by the defendant to the plaintiffs. The genuineness of this document is not in dispute by the parties. Thus the statement of PW-5 on the face of it is false and does not inspire confidence. Even otherwise, this witness has deposed that terrorist activity was also there

at the time of operation. He has not supervised the operation. It is, therefore, proved that 30901 number of scants of having a volume of 3005.050m^3 were handed over by the plaintiffs to the defendant. The defendant also handed over 29000 number of scants of timber, having a volume of 2584 m^3 to the plaintiffs at the destination.

The version of Sita Ram (DW-1) is identical to the stand taken in his written statement. He has categorically deposed that about 3,000 to 4,000 scants got damaged due to throwing of debris in the river and breaking of boom as a result of floods. He has deposed that the damaged report prepared by the official of the plaintiffs was also submitted to the superior officers. He deposed that the militants were repeatedly threatening that the timber in question would be burnt by them.

PW-4 has admitted having signed Ext.D-6, which is a report submitted to the superior officer to the following effect:-

"1) Keeping in view the correspondence on the above mentioned subject, the undersigned submits the following detailed report.

i) That the timber of Pangi Ghall which was stacked at different launching points away from the appropriate launching ghat/point by the labour supplying agency, was to be manually carried to the correct launching point and thereafter had to be launched in the Chinab River and as a consequence of which more time was wasted and the scants in this process were also broken and also the girth of the timber has also been reduced.

ii) *That due to the road being under construction on war footing at Paddar, J&K Arad, by the GREF authorities, the timber of Pangi ghall was subjected*

to damage during its floating process by way of striking against the huge boulders of the Chinab river and some timber was also buried in the process.

iii) That because of the floods in the river Chinab the Boom laid at Gulabgarh has lots its utility and the timber goes flooding downstream in river Chinab without being trapped at the boom point.

iv) That, as you know, that the Chinab river is a *dangerous river, it starts from Himachal Pradesh and courses down flowing through J & K State crosses into the boundary of Pakistan*. It is hundreds of kilometers long. Glaciers and huge trees uprooted in floods flow into it, and as a result of which the *floods assume such dangerous proportions that not to speak of ineffectiveness of the boom,* it also causes heavy loss to pucca houses, life and property in the vagaries of floods.

v) That the timber that flows downstream from the boom point due to floods, a number of which was though caught on the banks of the river Chinab at various places, *but the scant so caught were found broken or its volume was found decreased and some scants were completely lost/damaged in the river* and could not be retrieved altogether.

vi) That the reports/information of the loss/damage to the timber due to the construction of the road by the *GREF authorities, floods in the river Chinab and the loss of the capacity of the boom further resulting in loss/damage to the timber,* were also sent to the higher authorities from time to time, copies of which are being attached with this report.

vii) That a perusal of the information available about the average *loss/damage to the Pangi Ghall timber occurred during the last four years, the loss/damage occurred during the year 1992-93 to the ghall timber the average timber loss has been found very less*.

viii) That the work of catching of the floating timber was accomplished as per the prevailing circumstances, situation, and instructions given to LAC; whereas in the J & K area there are disturbances due to the terrorist activities and militancy. Despite this, the *LAC mobilized the ghall labour, assisted them in every manner and encouraged the labour, because due to militancy, the labour was refusing to wrk as that in J&KSFC*. The labour was scared and frightened by the physical assaults of the terrorists. The LAC encouraged and assisted the labour and got

> the Pangi ghall work executed from the labour. Had there been some other LAC, he would have ran away to save life leaving the work unaccomplished due to the militancy in the area, as a result of which all the ghall timber would have destroyed. In this manner, the loss of timber in Pangi Ghall, is not attributable to this LAC and he is not at fault.
>
> Therefore, keeping in view the above facts *the undersigned is enclosing the lists of loss of Pangi Ghall timber which comes to 4707 scants=481.420 volume, lot wise, species-wise, size-wise scants and the list of volume are being attached herewith. Due to the construction of road and the natural calamity the timber is declared as damaged*. The report is being submitted to yourself for information, sympathetic further necessary action."

Plaintiffs have admitted that due to floods the boom gave way resulting into washing away of timber downstream into the territory of Pakistan. Some of the timber also got buried under the glaciers, debris and boulders. Timber caught in the crevices could not be extracted. PW-3 and PW-4 have deposed that the defendant had employed sufficient labour to carry out the timely operations. It is admitted case that the work was carried out as per schedule.

In OSA 9 of 1999, titled as H.P.State Forest Corporation Ltd. and another vs. Ram Singh this Court has held that in the absence of any clause in the agreement, fixing the responsibility for the washing away of the timber in the floods no liability can be fastened on the contractor. None of the witnesses has deposed that the defendant had been negligent in executing the work. The loss occurred due to natural calamities, as has come on record through

the statements of DW-1, PW-4 and PW-3 and also the report of PW-4 Ext.D-6 submitted to higher authorities. Therefore, it cannot be said that the defendant had been negligent in performing the contract and had committed breaches thereof. The plaintiffs in my view are not entitled to the suit amount. Therefore, Issues No.1,1A and 5 are decided against the plaintiffs.

Relief:

In view of my findings on the aforesaid issues, the suit of the plaintiffs is dismissed. The decree sheet be prepared accordingly. In the peculiar facts and circumstances of the case parties are left to bear their own costs.

November 8, 2007 **(Sanjay Karol)**
™ **Judge.**